SERVED: August 3, 2006

NTSB Order No. EA-5240

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 26th day of July, 2006

MARION C. BLAKEY, Administrator, Federal Aviation Administration, Complainant, v. ROBERT W. KALBERG, Respondent.	Docket SE-17438

OPINION AND ORDER

Respondent appeals the written initial decision of Administrative Law Judge William A. Pope II, served on February 3, 2006.[1] By that decision, the law judge upheld the Administrator's Emergency Order of Revocation against respondent's airman (ATP) and medical (First Class)

[1] A copy of the law judge's decision is attached.

certificates.[2] We deny respondent's appeal.

The Administrator's June 16, 2005, emergency order, filed as the complaint in this proceeding, charged respondent with violating sections 91.17(a)(3) and 121.455(b) of the Federal Aviation Regulations (FARs), and, further, alleged that respondent is not qualified, in accordance with FAR sections 67.107(b)(2), 67.207(b)(2), and 67.307(b)(2), to hold an airman medical certificate.[3] The Administrator's complaint alleged the

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[2] Respondent waived the expedited procedural deadlines otherwise applicable to emergency revocation proceedings.

[3] FAR section 91.17 (14 C.F.R. Part 91) states, in relevant part, the following:

> **§ 91.17 Alcohol or drugs.**
>
> (a) No person may act or attempt to act as a crewmember of a civil aircraft --
>
> * * * * *
>
> (3) While using any drug that affects the person's faculties in any way contrary to safety[.]

FAR section 121.455 (14 C.F.R. Part 121) states, in relevant part the following:

> **§ 121.455 Use of prohibited drugs.**
>
> * * * * *
>
> (b) No certificate holder or operator may knowingly use any person to perform, nor may any person perform for a certificate holder or operator, either directly or by contract, any function listed in appendix I to this part while that person has a prohibited drug, as defined in that appendix, in his or her system.
>
> * * * * *

following facts:

1. At all times material herein you were and are now the holder of Airline Transport Pilot Certificate No. [redacted]. (Admitted)

2. You are now, and at all times mentioned herein were, the holder of an Airman Medical Certificate First Class #FF-3000611 issued to you on March 2, 2005 by Dr. David G. Daniels of Louisville, KY. (Admitted)

3. On or about April 18, 2005, you were employed by United Parcel Service (hereinafter UPS), a 14 C.F.R. Part 121 certificate holder, as a pilot performing flight crew duties. (Admitted)

4. A pilot performing flight crew duties for UPS performs a safety-sensitive function pursuant to 14 C.F.R. Part 121, Appendix I, Section III and is a covered employee subject to testing pursuant to 14 C.F.R. Part 121,

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(..continued)
FAR section 67.107 (14 C.F.R. Part 67, "Medical Standards and Certification") states, in relevant part, the following:

> **§ 67.107 Mental.**
>
> Mental standards for a first-class airman medical certificate are:
>
> * * * * *
>
> (b) No substance abuse within the preceding 2 years defined as:
>
> * * * * *
>
> (2) A verified positive drug test result acquired under an anti-drug program or internal program of the U.S. Department of Transportation or any other Administration within the U.S. Department of Transportation[.]

FAR sections 67.207 and 67.307 contain similar language for second- and third-class medical certificates.

Appendix I, Section V. (Admitted)

5. On or about March 7, 2005, you were selected to undergo random drug testing pursuant to 14 C.F.R. Part 121, Appendix I, Section V.

6. On or about April 18, 2005, you acted as pilot for UPS flight 6964 to Ted Stevens International Airport, Anchorage, Alaska. (Admitted)

7. Upon arrival in Anchorage, Alaska, you were notified by UPS gateway management to report for a random drug test. (Admitted)

8. At all times pertinent herein, UPS had an FAA-approved Anti-drug Program in accordance with Part 121, Appendix I, and 49 C.F.R. Part 40. (Admitted)

9. On or about April 18, 2005, Robert Burlinski, Aero Health, Anchorage, AK, collected a urine specimen from you at the UPS operations restroom. (Admitted)

10. The specimen was forwarded to LabCorp for analysis.

11. On or about April 22, 2005, LabCorp's analysis indicated that your urine specimen contained a marijuana metabolite.

12. On or about April 22, 2005, Dr. Melissa Barrett, MRO, MedEast Physicians, verified your drug test as positive for marijuana.

13. You requested that the split specimen be tested.

14. The split specimen was tested by Northwest Toxicology of West Valley City, UT.

15. On or about April 29, 2005, Northwest Toxicology confirmed the presence of marijuana metabolites in the split specimen.

16. By reason of the facts and circumstances set forth above, you acted as pilot, a position requiring the performance of safety-sensitive functions[,] when you had marijuana, a prohibited drug, in your system.

> 17. By reason of the facts and circumstances set forth above, you lack the qualifications to be the holder of any airman pilot certificate and any airman medical certificate.

A hearing was conducted on December 13-14, 2005. The Administrator presented evidence regarding the urine specimen collection, chain of custody information, and the finding of marijuana metabolites in respondent's urine specimen reported by LabCorp and Northwest Toxicology. Respondent essentially claimed that to the extent the test results could be deemed valid, it was only because he must have inadvertently and unknowingly come in contact with marijuana. He testified that he believes the most probable explanation is that he inadvertently ingested marijuana by virtue of smoking several "house" cigars he had recently purchased while on a family vacation in Aruba.[4] The law judge, who did not find respondent's exculpatory claims credible, concluded that the test results were valid and affirmed the Administrator's emergency order of revocation.

On appeal, respondent advances numerous arguments that can generally be grouped into two broad categories: (1) the reported drug findings were not proven to be the result of tests conducted on his urine specimen, and, alternately, (2) the marijuana metabolites that were detected in respondent's urine specimen were not the result of any knowing or intentional conduct. The

[4] The law judge's excellent and well-reasoned decision provides a very thorough recitation of the testimonial and other evidence presented by both parties. Therefore, we need only discuss the evidence to the extent necessary for discussion of the relevant legal issues raised in respondent's appeal.

Administrator has filed a reply brief urging us to uphold the law judge's decision.

We agree with the law judge's analysis, and, generally, the arguments set forth in the Administrator's reply brief; we discern no basis to overturn the law judge's decision. First, respondent demonstrates no legitimate issue with the chain of custody of his urine specimen, or any other grounds for concluding that the LabCorp and Northwest Toxicology findings were not based on tests of the urine specimen respondent provided after disembarking from his aircraft on April 18, 2005. *See* Administrator's Reply Brief at 8-14; Initial Decision at 8-9. None of respondent's arguments demonstrate that the law judge admitted irrelevant evidence; nor does respondent demonstrate that the law judge afforded undue weight to the LabCorp or Northwest Toxicology test records, or the testimony explaining the reliability of those records.

Respondent also does not demonstrate any error in the law judge's application of the applicable FAR provisions. The relevant Part 67 provisions make clear that in order to qualify for a medical certificate an airman must not have had a "verified positive [DOT] drug test result" within the past 2 years. See, e.g., 67.107(b)(2). It is clear that respondent does not currently meet this standard. Moreover, the Administrator presented the testimony of FAA Regional Flight Surgeon Dr. David Millett, who was accepted without objection as an expert in clinical aviation. Dr. Millett testified that it was FAA

practice to revoke any medical certificate upon a verified positive DOT drug test. Transcript at 193-195. Dr. Millett's testimony is also corroborated by Exhibit A-16, which is a memorandum from the federal air surgeon seeking emergency revocation of all medical certificates held by respondent on the basis of finding, upon review of the information pertaining to respondent's positive DOT drug test results, that respondent does not meet the requirements of FAR sections 67.107(b)(2), 67.207(b)(2), and 67.307(b)(2) and is, "unable to safely perform the duties or exercise the privileges of any airman certificate."[5]

As for the operational violations, we agree with the law judge that the Administrator presented a *prima facie* case of respondent's violation of FAR sections 91.17(a)(3) and 121.455(b) by virtue of proving a verified positive drug test (administered pursuant to DOT requirements immediately following respondent's execution of his duties as captain of a commercial air carrier flight). Accordingly, it was respondent's burden to prove his affirmative defense to the regulatory violations (inadvertent or unknowing ingestion of marijuana) by a preponderance of the evidence. See, e.g., Administrator v. Tsegaye, NTSB Order No. EA-4205 at n.7 (1994) ("Respondent must prove his affirmative defense by a preponderance of the evidence."). In this regard,

[5] As the law judge also appropriately observed, "[w]hen or if…[r]espondent may be qualified for issuance of a new medical certificate is a matter to be first determined by the Federal Air Surgeon." Initial Decision at 10.

the law judge made a clear, adverse credibility finding against respondent's claim that any ingestion of marijuana on his part was inadvertent and unknowing. Board precedent is clear that credibility determinations are generally within the exclusive province of the law judge and will not be disturbed in the absence of arbitrariness, capriciousness, or some other compelling reason. See, e.g., Administrator v. Smith, 5 NTSB 1560, 1563 (1986); cf. Administrator v. Crocker, NTSB Order No. EA-4565 at 6 (1997) ("we do not withhold the deference customarily afforded a law judge's credibility assessments simply because other evidence, of whatever description, arguably could have been given greater weight"). Respondent demonstrates no compelling reason, nor do we discern one, to overturn the law judge's negative assessment of his exculpatory claims.

Indeed, although we need not reach respondent's argument that the Administrator was required to prove *scienter* in light of our opinion that respondent's uncredited explanations for the marijuana metabolites in his urine were insufficient to carry his burden to rebut the Administrator's *prima facie* case of the operational violations, it is doubtful whether respondent's exculpatory claims, even if believed, would establish a legally sufficient defense to the operational violations. In this regard, we note that DOT drug testing requirements specify that the medical review officer (MRO) must verify a confirmed positive test result unless the employee presents a legitimate medical explanation for the presence of drugs found in his system. 49

C.F.R. § 40.137. DOT drug testing requirements specify that explanations by an employee of "inadvertent" or "passive" ingestion of drugs do not constitute a legitimate medical explanation that can be considered by an MRO as a basis to not verify a positive drug test result. 49 C.F.R. § 40.151.

Having reviewed the entire record, including arguments on appeal by respondent not specifically addressed in this appeal, we discern no error in the law judge's well-reasoned decision upholding the Administrator's emergency order of revocation.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and

2. The Administrator's emergency revocation of respondent's airman and medical certificates is affirmed.

ROSENKER, Acting Chairman, and HERSMAN and HIGGINS, Members of the Board, concurred in the above opinion and order.